UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 20 CR 500 (JGK)

ARTHUR HAYES, BENJAMIN DELO
SAMUEL REED and GREGORY DWYER,

Defendants.

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New York, N.Y.
January 20, 2022
3:40 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

DAMIEN WILLIAMS
United States Attorney for the
Southern District of New York
SAMUEL RAYMOND
Assistant United States Attorney

JAMES J. BENJAMIN, JR.
Attorney for Defendant Hayes

PATRICK J. SMITH
ANDREW J. ROGERS
Attorneys for Defendant Delo

DOUGLAS YATTER
Attorney for Defendant Reed

JENNA DABBS
Attorney for Defendant Dwyer

(Case called)

MR. RAYMOND: Good afternoon, your Honor.

This is Sam Raymond, joined by college Thane Rehn, for the government.

MR. BENJAMIN: Good afternoon, your Honor.

Jim Benjamin and Katey Goldstein, from Aken Gump, appearing on behalf of Authur Hayes. We are joined by our colleague, Kate Shapiro. And Mr. Hayes is on the line, as well.

MR. SMITH: Good afternoon, your Honor.

Patrick Smith, with my colleague, Andrew Rogers, for the defendant Ben Delo, who is present with me and on the line.

Good afternoon.

THE COURT: Good afternoon.

MR. YATTER: Good afternoon, your Honor.

Douglas Yatter, from Latham & Watkins, together with my partner, Ben Naftalis, for Sam Reed, who is also on the line.

MS. DABBS: Good afternoon, your Honor.

Jenna Dabbs, from Kaplan Hecker & Fink, for Mr. Dwyer. I am joined on the line by my colleagues, Sean Heckle and Mike Ferrara. Mr. Dwyer is on the line, as well.

THE COURT: All right. Good afternoon, everyone.

I am sorry for the delay. I was on another criminal case which ran longer than originally expected.

Today I have correspondence from the parties, from the defendants dated January 18, and the government's response today, January 20. I also have the motions in limine which have been briefed so far.

If there are any other issues that the parties have, I'm perfectly prepared to consider them but let me deal first with those issues.

So, the dueling correspondence from January 18 and January 20, there are two issues. The first is, the tank team has reviewed some documents. The only privilege that's possibly being asserted is a BitMEX privilege. Defendants objected that the government has not yet turned over the materials because they say that BitMEX has agreed to waive its privilege if the documents are simply produced to BitMEX.

The government says okay. At this point they will produce the documents to BitMEX today, January 20. And if BitMEX is not asserting the privilege, the documents will remain with BitMEX. The redacted copies have already been produced.

The government says give BitMEX a date. I don't know why the parties can't discuss that among themselves. There are some indications in the government letter that they're not (technical interruption) here any more, that when BitMEX discloses the documents to the individual defendants that that's not a waiver of BitMEX's privilege. But the government

hasn't reached that decision yet.

It also -- well, somewhat inconsistent with the government's position about how BitMEX's statements are statements of individual defendants, but no reason to reach that either. It doesn't appear that there's anything for me to do on this. The government is going to produce, the redacted documents have already been produced to the defendants. And the documents are going to be produced to BitMEX today, by today to see if BitMEX is intending to assert any privilege. in any event, BitMEX will have the documents and BitMEX can do what it will with the documents. Again, it doesn't seem as though there's anything for me to decide here.

The second issue is the parties have appeared to reach the end of the line with respect to the documents that the government has been able to get from the CFTC to produce to the defendants. I've already indicated in the past that this cooperation between the government and the defendants and the CFTC has resulted in a great deal of information being provided by the CFTC that might not otherwise have been provided, and that there's a very limited today amount of material that the CFTC had not produced. And so, the continuing negotiations between the parties was very productive.

There was and is outstanding a request by the defendants for additional, that the government produced additional documents from the CFTC, that the government be

required to produce those documents because the CFTC was in fact conducting a joint investigation with the government and it's never been necessary for me to rule on whether it was a joint investigation or a parallel investigation. Although, I intimated some views on that subject because the continuing negotiations were very productive toward producing documents. And the defendants have never asked me to rule specifically on whether the investigation with the CFTC was a joint investigation or simply a parallel investigation. Although, I intimated some views on that subject. So, that issue is still out there. Whenever the defendants want me to rule on that, I'm perfectly prepared to rule on that issue, today or at any other time.

But at this point, the defendants have proposed to issue a subpoena and they asked me to sign it for the CFTC. So, the government objects. Although, they say they're not sure they're the right party to object, they don't know since it's subpoena directed to the CFTC, whether they have standing or not. They're looking at it but they say that the subpoena is plainly improper, overbroad.

My general view is I sign subpoenas because if a party objects to the subpoena then I'll rule on the objections to the subpoena and I may quash the subpoena, but at least it should be subject to an adversary process.

Having said that, even without getting the defense

letter, I looked at the subpoena and I had intended to urge the defendants if they were serious about the subpoena, to look carefully at the Nixon case and make sure that they were comfortable that the subpoena was in fact the subpoena for evidence to be used at trial and not simply a discovery subpoena or more akin to a request for documents in a civil case, because if the subpoena was overbroad in response to an objection, it would be quashed. And so, this particular subpoena has definitions which go on for pages, followed by requests which include such things as all CFTC investigative documents or communications relating to HDR or defendants that the CFT has not produced to the department justice in connection with United States against Hayes. That, in and of itself, appears to be a dragnet rather than requesting specific documents where there's a good faith belief that they are evidence for trial.

So, that was my reaction to the subpoena. If the defendants want to proceed with that subpoena, so be it. I'll look at it again. I would probably sign it in order to give the parties, whether it be the CFTC represented by their own counsel or the government, if appropriate, the opportunity to move to quash the subpoena.

But it would, I would have thought, behoove the defendants to try harder because it would take time to move to quash a subpoena, get a response, get a reply and the Court to

rule and you'll all be weeks down the road with respect that to that.

So, those were my observations on the recent correspondence, the January 18 letter from the defendants and the government's response.

MR. NAFTALIS: Thank you, judge.

What we would propose is, judge, let us rereview the rider this evening and we'll come back to the Court with an (inaudible) as written or any modification consistent with your comments just now.

THE COURT: Okay.

MR. NAFTALIS: Is that okay?

THE COURT: Yes, sure.

MR. NAFTALIS: And as to the tainting question, just so we're clear, assuming and BitMEX has already consented to the provision of the privileged documents to the defendants, as soon as they reaffirm that, is it your intention that the government should produce that to us?

THE COURT: I don't see the correspondence as any objection to that.

MR. RAYMOND: Your Honor, I think just the issue that sort of spoke in the wheel, we would want to convey to BitMEX counsel before we actually are -- by "we" I mean the tank team, were to produce that that we would want first, that we would want to look at the materials and actually assert a privilege

or not, and then to discuss whether or not production to the defendants constitutes a waiver vis-a-vis the investigative team and vis-a-vs any other party.

So, I think that would be the interplead that we would want to discuss with the next corporate counsel before making that production and get their prospective on that --

THE COURT: That's fine. I want to make sure that people go through this process with eyes open. If there's a dispute, you can bring it to me. I'm not opposed to the government discussing this with BitMEX counsel or, certainly, BitMEX counsel looking at the specific documents and determining whether it is asserting a privilege or not asserting a privilege. If it's not asserting a privilege then the documents go to the government trial team because there's no privilege, at least as I understand it.

If BitMEX says, yes, we are asserting the privilege, it doesn't go to the government. But then it's up to BitMEX if it chooses to give those documents to the individual defendants. And the government is now raising a caution that BitMEX may in fact be waiving its privilege by giving them to the individual defendants but that's up to BitMEX.

MR. RAYMOND: Your Honor, the company has already written to the government on November 19 saying They have no objection to producing anything to us. So, I would hope that this is not something that requires another comeback to the

Court given that it's been two months since we have been waiting for this.

THE COURT: I hope so too. But I don't see an issue with assuring that BitMEX is doing this with eyes open with respect to the specific documents at issue.

And second, we are about two months away from trial and there is no provision that I'm aware of on these documents that would have required that they be produced, required under the rules that they be produced before now. So, they're still being produced two months before trial.

There's been more early production in this case than usual which is good. I encourage it. Helps to prepare for trial, helps to narrow the issues but making sure that BitMEX has eyes open. It's certainly a good thing, isn't it?

Okay. Any other thoughts on these two issues? No. Okay. Which leads then to the defendants' motions in limine.

I have gone over the motions and I am prepared to rule. If the parties want to indicate anything else after I've ruled or explain to me why I should be ruling differently, I'm perfectly prepared to listen but I don't have any questions based on the papers at this point.

The defendants have filed six motions in limine. Decisions on motions in limine are necessarily preliminary and can be changed before or during trial. That is particularly true in this case where the motions have been filed

considerably before trial and where some of the motions are not directed at specific information and where the positions of the parties may change, and where the defendants are not required to present any evidence. Nevertheless, the Court will deal with the defendants' motions as currently briefed, without prejudice to reconsideration.

First, the Defendants move to preclude the government from offering any statements from a purported debate between defendant Hayes and Neil Roubini in July 2019, termed the "Tangle in Taipei." In response, the government narrowed its offer to three segments. The defendants contend that the statements are irrelevant, and that any relevance is substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403. The Court agrees. The segments are excluded at this point,

In segment 2, Hayes spoke in a plainly jocular fashion about the small cost of bribing an official in the Seychelles where BitMEX was incorporated. The government concedes that this is no evidence that any bribe was paid, and invites the Court to give a limiting instruction to that effect, but argues that the quote is relevant to show the defendant's desire to avoid regulation. It is difficult to credit that argument. The clip is plainly inflammatory because it precisely suggests bribery in the most crass way, and the danger of unfair prejudice is not outweighed by the relevance of showing that

the defendants thought that the Seychelles was a less regulated jurisdiction than the United States. It is hard to believe that the prejudice from joking about bribing in the Seychelles could be cured by an instruction that tells the jury, Never mind, there's no evidence of bribery in the Seychelles. Plainly, the relevance of the segment is substantially outweighed by the danger of unfair prejudice which would not be cured by a limiting instruction.

Segment 1 is a statement by Mr. Roubini to the effect that US investors are subject to US regulation and can avoid detection by using a VPN. The statement is offered, not for its truth, but for its notice to Mr. Hayes. But the context of the entire debate makes any individual statement suspect because of the circus-like atmosphere. In any event, the statement has little relevance. It came in July 2019, almost four years after the beginning of the alleged conspiracy. And presumably, there will be more specific evidence as to the ability of US citizens to use VPNs to avoid detection. Indeed, it's one of the items that specifically mentioned in the indictment. The relevance of this piece of the debate is outweighed by the danger of unfair prejudice, particularly, because it will be necessary to place any comments from the debate into the context of the debate, which is loaded with opprobrious comments by Roubini against Hayes.

Finally, segment 3 suggests that Hayes objects to the

burden of anti-money laundering regulations. But the relevance of this comment is outweighed by the danger of unfair prejudice for the reasons already explained. The defendants assert in their responses to the pending motions that there will be no dispute at trial that BitMEX did not attempt to adopt anti-money laundering procedures. The relevance of this comment therefore, is substantially outweighed by the danger of unfair prejudice, namely, the need to place the comment in the perspective of the debate which is laden with highly prejudicial attacks on Hayes.

Second, the defendants move to preclude evidence of other legal actions. In response to this motion, the government states that it will not offer evidence of other private lawsuits against BitMEX. That portion of the motion is therefore moot. Those other actions plainly should not be mentioned because the government undertakes that they will not be.

The defendants also seek to preclude -- if of course the evidence at trial changes, these other lawsuits should not be mentioned without bringing it to the attention of the Court outside the presence of the jury.

The defendants also seek to preclude evidence of the CFTC civil lawsuit against BitMEX and the defendants that was filed on the same day as the indictment in this case and that was settled by BitMEX without BitMEX's admitting or denying the

allegations in the complaint, and is still pending against the defendants in this case.

The defendants also seek to preclude a lawsuit filed by FinCen against BitMEX and the defendants that was also resolved in the same way as the CFTC lawsuit.

The government says that it will not seek to offer those lawsuits unless the defendants argue that the law was unclear, in which case it will offer the lawsuits and the settlements. But this argument fails on several levels. The lawsuits were only brought at the same time as the indictment in this case. Therefore, the lawsuits could not have provided notice to the defendants about what the law was at the time that the defendants allegedly violated it. Moreover, allegations in a complaint are simply that, allegations.

See In re Blech Sec. Litig., No. 94-cv-7696, 2003 WL 1610775, at *11 (S.D.N.Y. Mar. 26, 2003).

The fact that the CFTC took a position in litigation, or that FinCen did, without a court decision affirming that interpretation was correct, does not establish the meaning of the law. Similarly, settlements without admitting or denying any of the allegations do not establish the law. Therefore, at this point, the government has failed to proffer any relevance to the CFTC and FinCen lawsuits or settlements. And certainly, any relevance is substantially outweighed by the danger of unfair prejudice. The lawsuits are laden with prejudicial

allegations that the defendants in this case have never accepted, and the relevance of the lawsuits and settlements and the relevance of the settlement is substantially outweighed by the danger of unfair prejudice.

Finally, the Government refers in passing to the fact that defendants may have made statements in the course of those lawsuits which can be admitted as evidence of prior statements of a party opponent, but the Government has not pointed specifically to what those statements are and therefore, the Court could not rule on their admissibility at this time.

Therefore, the motion to exclude the CFTC lawsuit and settlement and the FinCen lawsuit and settlement and other civil lawsuits against BitMEX is granted.

By the way, whoever is not muted should place their phone on "mute".

The defendants move to dismiss any evidence of alleged suspicious trading activity on BitMEX, and specifically, the findings by FinCen about the amount of suspicious trading activity on BitMEX, and the failure to file Suspicious Activity Reports ("SARs"). In response, the government appears to take the position that it will not seek to admit evidence of any suspicious trading activity unless it was known to one of the defendants. But the papers are unclear as to what specific incidents the government seeks to admit, what the specific evidence is and what the alleged knowledge of one of the

defendants was. The papers became even more clouded by assertions that the suspicious activity may have been known to one of the defendants' agents and that the government many seek to admit evidence of what one of the defendants should have known. But the Court cannot decide this motion without knowing the specific evidence that is at issue. It appears plain at this point that the Government does not seek to admit general evidence about the extent of suspicious activity on BitMEX.

Therefore, the motion is denied without prejudice.

The defendants seek to require the government to submit expert disclosure reports for witnesses that the government contends are simply lay witnesses, namely, CFTC witnesses, a FinCen witness, and an FBI witness. The government contends that all of these witnesses are lay witnesses and that therefore, the government does not have to make the detailed disclosure of an expert witness required by Federal Rule of Criminal Procedure 16(a)(1)(G). The government says that each of these witnesses will simply testify as lay witnesses pursuant to Federal Rule of Evidence 701 about opinions rationally based on their own perceptions and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Rule 702, in turn, allows a witness to testify as an expert if qualified by knowledge, skill, experience, training or education if "the expert's scientific, technical, or other

specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."

The government's description of this testimony is somewhat at odds with another statement in its papers that the CFTC witnesses will not "testify about their prior fact-based expertise." Govt. Resp. at 12.

In any event, it is plain that each of these witnesses is not testifying simply to what the witnesses have perceived, but rather to issues on which they have specialized knowledge. The CFTC witnesses and the FinCen witness are testifying to the regulatory background of the statute at issue in this case. They are not testifying about facts that they perceived. And to allow them to testify to the regulatory framework without a detailed expert report would invite opinions that otherwise can, and should be challenged before trial.

The government asserts that its witnesses will not be usurping the role of the trial judge in instructing the jury as to the applicable law, Govt. Resp. at 13, but that "the witnesses are testifying only to their understanding of the law from the course of their employment." Id. But that is precisely what experts are not supposed to do. The jury is to be instructed as to the law by the Court and not by alleged experts from the government or the defense. Experts can provide expert testimony as to the regulatory framework to help the jury understand unfamiliar terms and concepts, but its use

must be carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying the law to the facts before it.

See United States v. Bilzerian, 926 F, 2d 1285, 1294 (2d Cir. 1991).

Indeed, as a general rule, an expert's testimony on issues of law is inadmissible. Id. But the Court of Appeals allowed testimony about regulatory background from Professor Coffee in a securities case. Id. If an expert witness cannot testify about what the law is, it is not apparent why an alleged lay witness should be permitted to testify about what the law is under the cover of a statement that it is only the witness's lay opinion about what the law is. What the law is is something for the Court to instruct the jury on and it is for the parties to provide sufficient input to the Court to instruct the jury on what the law is.

The government's effort to cloak expert testimony as lay testimony is all the more reason for detailed expert reports under Federal Rule of Criminal Procedure 16(a)(1)(G). When those reports are prepared, specific opinions that are impermissible can then be excluded prior to trial. This applies to both the defendants and the Government.

Similarly, it is plain that FBI Agent Berger is not testifying about matters that he perceived, but rather to an

analysis of records that have been provided to him for purposes of this litigation that he has analyzed using his considerable computer science expertise. That is expert testimony, not lay testimony and he should also provide a detailed expert report pursuant to Rule 16(a)(1)(G).

Therefore, the government's CFTC, FinCen, and FBI witnesses should submit proper expert reports pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G). The parties can then agree upon a proper schedule, and then the defendants can make specific objections to specific opinions.

Of course, if an expert were to attempt to offer an opinion at trial that is not contained in the detailed expert report, that opinion could be excluded. Therefore, there is all the more reason for the parties to provide detailed expert reports that include the specific opinions by the expert.

Finally, the defendants move to preclude the government from offering evidence of unrelated offenses, specifically, fraud, manipulation, and customer losses. The government responds that it does not intend to offer evidence of these other unrelated offenses, but that evidence of some of these items might well be part of the evidence of the crimes at issue. For example, United States customers may have been victims and complained to BitMEX making it clear that they were in fact US customers. The Court cannot decide to preclude any of this evidence without reference to specific evidence that is

sought to be excluded. Therefore, the motion is denied without prejudice.

That concludes the defendants' motions in limine. Let me deal with the government's motions in limine nation.

The Court agrees basically with the defense observation that the government's motions in limine fail to refer to specific evidence to be included or excluded at trial and thus, are not proper motions in limine. Moreover, many of them are so general that they could not be decided on the current record.

Finally, some of the motions provide the detail for the alleged proffers only in the reply brief without an opportunity for the defendants to respond and thus, also could not be decided on the current record. To the extent that the Court can offer any observations on the current motions, the Court will, without prejudice to further briefing by the parties on specific evidence. And as the Court has already pointed out in response to the defendant's motion in limine, the decisions on these motions are without prejudice to reconsideration.

First, the government argues that statements by the defendants' agents and co-conspirators are admissible. But the government largely simply repeats well-accepted concepts from the Federal Rule of Evidence 801(d)(2) that statements by agents are not hearsay, without specific reference to specific

statements.

The government also points out without contradiction that statements no offered for their truth are not hearsay. But the government generally does not point to any specific statements that show how those specific statements are admissible, why they are not being offered for their truth and why many of those statements may well not be contested at trial. The government also points out that statements by co-conspirators are admissible, an unacceptable proposition, but the government has largely not identified the co-conspirators. And generally, statements by co-conspirators would be admitted at trial subject to connection.

See Bourjaily v. United States, 483 U.S. 171, 175 (1987); see also United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

The Court could not make the necessary findings before trial. The government does specifically refer to statements by BitMEX as admissible, but with the exception of the BitMEX wells position does not identify the statements it seeks to admit. The government provides various reasons for admissibility, but does not point to a case where a corporation's statements are automatically admissible against a shareholder. The government points out that a defendant could have adopted a statement by BitMEX, but does not develop that argument in the context of any specific statement and the Court

could not rule on that issue on the present record. There is no proffer as to what the specific statements by BitMEX that a defendant specifically adopted were.

Therefore, the motion is denied without prejudice to further development in the context of specific statements. It may well be that this is an issue that should await trial unless there are specific statements that require decision before trial and that the Court could determine admissible or not admissible prior to trial.

The government argues that documents produced by BitMEX should be admissible as business records. It is self-evident that if the records are authentic and properly satisfy the requirement of Federal Rule of Evidence 803(6), they would be admissible as business records and the defendants do not disagree. Obviously, there may be issues with respect to specific records and that could not be decided at this point on this record. The government also seeks a ruling that a proper certification under Federal Rule of Evidence 902(11) will be sufficient without the testimony of a custodian. But no ruling is necessary. That is what Federal Rule of Evidence 803(6)(D) explicitly provides. Of course, there can always be the need for testimony if there is something questionable about a document such that the circumstances indicate a lack of trustworthiness. See Fed. R. Evid. 803(6)(E). But the government does not need a ruling that otherwise simply follows

the explicit provision of Fed. R. Evid. 803(6)(D). The parties also indicate that this motion may be moot because the parties are working on stipulations as to the admissibility of business records. Plainly, a stipulation with respect to the admissibility of large numbers of business records would be in all parties' interests.

The government seeks to admit evidence of BitMEX's failure to file SARs and its facilitation of suspicious transactions and sanctions. The defendants do not object to evidence that BitMEX did not file SARs. The defendants also do not appear to object to the introduction of specific evidence of specific transactions that came to the attention of one or more of the defendants. But there is no specification of the specific evidence that is at issue.

The government seeks to introduce evidence about transactions with Iranian customers, but it is unclear from the papers what the specific evidence is, and the Court could not decide the issue on the present papers. The Court notes that the indictment charges that internal BitMEX reports identified that customers located in Iran were subject to US sanctions traded on the platform from at least in or about November 2017, to at least in or about April 2018. And that defendants Hayes and Delo personally communicated with BitMEX customers who self-identified as Iranian. And BitMEX did not implement a formal anti-money laundering policy in response to this Iranian

customer activity. Indictment Paragraph 14.

Whether dealing with Iranian customers and so integrally intertwined with evidence of the conspiracy or arose out of the same facts or transactions that form the basis for the charges in violation of the Bank Secrecy Act, as charged in the indictment has not been sufficiently developed so that the Court could decide the issue on the present papers.

The government seeks to introduce alleged false statements to a Hong Kong Bank and the San Francisco Exchange. The government argues that this evidence is not Rule 404(b) evidence because it is inextricably intertwined with the charged offense and arose out of the same series of transactions as the charged offenses.

See United States v. Towne, 870 F.2d 880, 886 (2d Cir. 1989).

This is a correct statement of the law but the half page devoted to explaining why this is true, Govt. Br. at 32, fails to explain why this is so in connection with the specific acts relating to the San Francisco Exchange. In its Reply Brief, the government spends seven pages attempting to explain why this is so, but the defendants never had the opportunity to respond to why the alleged Hong Kong Bank scheme was inextricably intertwined with the charged conspiracy. And indeed, one of the underpinnings of the argument that the defendants were attempting to separate themselves from any

association with Bitcoins, appears to strain credulity in view of the government's arguments about the prominence of the defendants in Bitcoins.

Moreover, the government did not appear to respond at all to the argument that there was no showing that the alleged false statements to the San Francisco Exchange were inextricably intertwined with the conspiracy alleged in the indictment.

With respect to the government's argument that this evidence is admissible as Rule 404(b) evidence, Rule 404(b) should generally be reserved for the government's rebuttal case when it is clear what issues the defendants have put in issue and when the Court can make an informed Rule 403 balancing analysis.

See United States v. Colon, 880 F.2d 650, 661 (2d Cir. 1989).

At this point, the Court could not decide the admissibility or inadmissibility of this evidence and either party may make a subsequent motion with respect to its admissibility or inadmissibility.

The government moves to preclude the expert testimony of the defendants' expert witnesses: Professor Jerry Markham, former CFTC Commissioner, Jill Sommers, and derivatives industry expert Marc Nagel. The government does not contest the expertise of these proposed witnesses but argues that the

subject of their testimony, namely, the regulatory framework for the industry at issue in this case, should be the subject of lay testimony and not expert testimony. For the reasons already explained in response the Government's motion in limine, this is a subject of expert testimony, and the defendants' experts properly submitted expert reports and the government's purported lay witnesses should also produce expert reports. Therefore, it is not a proper objection that the defendants have submitted expert reports. The reports were properly submitted.

There appears to be some confusion between the parties as to the proper scope of expert testimony. The government objects to the substance of the defense expert reports to the extent that the experts testify as to what the law is or that the law was unsettled or confusing. However, the government's proposed witnesses on this subject would purport to give their lay opinion as to what the law is.

As the Court already explained, it is for the Court and not for the witnesses to tell the jury what the law is. It is apparent that witnesses on both sides are attempting to push the boundaries of expert witness testimony. But the only way to police the boundary is to make specific objections to specific parts of the expert reports on both sides and for the Court to rule on those objections. The Court cannot preclude the testimony of the defendants' experts without specific

objections directed to specific conclusions in the expert reports. To the extent that the expert reports are insufficient to provide a detailed account of the opinions, they should be more detailed. The experts, of course, will be precluded from giving any opinions not contained in their expert reports. Therefore, there is an incentive to making those reports as comprehensive as possible.

At this point, the Court cannot preclude the defendants' experts from testifying, but the government may move to preclude any specific opinions rendered in the expert reports. If the reports are inadequate, fuller reports should be provided. The experts will be precluded from offering any opinions not included in the expert reports.

Thus far, the government has not provided a basis to preclude the expert testimony of a representative from AquaQ. Therefore, the motion to preclude that testimony is denied without prejudice to raising any specific objections to the expert report.

Finally, the government seeks to preclude the defendants form making any arguments inconsistent with the Court's instructions on the law. Naturally, the defendants profess to having no such intention. The motion is therefore denied as moot.

The government moves to preclude any cross examination of Witness One as to alteration of evidence. The motion is

denied. Based on the evidence about evidence of attempting to destroy evidence, there is a sufficient basis to examine the witness as to alteration of evidence.

The government also seeks to preclude examination of a certain aspect of alleged motive. This motion is also denied. There is ample basis to cross-examine with respect to motive and there is a sufficient connection to motive to allow this examination. The defendants appropriately undertake not to examine the witness as to any religious topics.

So ordered.

All right. I've denied the motions that were made. I know that there's a current motion to dismiss the indictment which is currently being briefed. I remind the parties that I don't in a criminal case impose any page limits because I never want to limit the parties to what they can tell me. But I always believe that briefer is better and more persuasive. So, the parties can conduct their briefing accordingly. I don't limit you. I don't place time limits. I don't place page limits. But everything that you write has to go through me. So, a sufficient caution in view of the multiplying papers. The parties are welcome to comment on everything that I've said and to raise any other issues with me.

Always good to get together with you.

MR. BENJAMIN: Your Honor, we have no comments or question. We appreciate the Court's thorough attention to all

the motions.

MR. REHN: Your Honor, we don't have questions about the Court's rulings. There is one thing I just wanted to raise with the Court briefly was the government had filed a letter regarding the requests to charge and the defendants have filed a significantly longer responsive letter on January 14th. We would ask for a leave to file a reply to that letter in accordance with the motion to dismiss.

THE COURT: Sure. Of course. I usually don't reach the request to charge until later but, perhaps, in this case I'll review the request to charge and the parties' objections in connection with the motion to dismiss. I think that's probably a good idea. Okay? So, sure, you can file a reply.

MR. ROGERS: We also thank you for your attention to these motions and your statements today and have no further questions.

THE COURT: Okay.

MR. SMITH: Nothing further on the motions. I do have maybe something more than a housekeeping matter on the status of discovery. There is a substantial amount of data that was produced by BitMEX to the government on, I believe it was December 2nd, involves data relating to a customer service application known as "Fresh Desk" that BitMEX used to correspond with its customers. It's a pretty substantial amount of data. It's been sitting with the government for at

least six weeks. We've inquired repeatedly as to the status of producing it to us and our vendor. As of right before this call our vendor had not received production of the data. We followed the usual procedure, sent them a drive to receive the data. There's a lot work to do on this data, your Honor. And as you noted, we're two months out from trial. I just don't quite understand what the delay has been. I don't want to speculate on any slow walking of this. We just need the data. And I'd like to hear from the government as to the reason for the delay and when we could expect it.

THE COURT: Okay.

MR. REHN: I don't think the defendant has the timeline exactly right. I think we received that data on September 13. But in any event, when we receive data from the company we have to upload it to our system and process it and Bates stamp it so that it can be searched and sort of adequately produced in a way that is useful to the parties. We have been engaged in this process. As the defense notes, it's somewhat voluminous data and takes some time to do that. We have previously attempted to produce to the defendants data we've obtained from third parties directly. They've asked us not to do that. They've asked us to process it and date stamp it. That just takes time because the computer can only run so fast. So, we're engaged in that process. We expect that this data will be released within a week.

THE COURT: Okay.

MR. SMITH: It's just kind of hard to credit that response. It doesn't take weeks and weeks to process the data. They told to send the drive down ten days ago. We sent it. that's a signal that it's ready. Everyday that goes by without access to this data, which I would note is chock full of exculpatory material to raise our ability to prepare for trial.

MR. REHN: Your Honor, a couple things. Number one, we are processing it as quickly as we can. I can assure you it's with our vendor being stamped and we will produce it as soon as it's ready to go.

I would just note, defense counsel's just indicated the defense is very well aware of the contents of these materials. These are materials that were produced by the company BitMEX, which of course the defendant controlled and operated throughout the period in question. That company has been very slowly producing information to us pursuant to a subpoena I think for some two years, including information as recently as just last month, the data we're talking about now. (technical interruption) late production, we are attempting to turn it around and produce it.

THE COURT: Mr. Smith, you don't have to answer if you don't want. So, BitMEX produces the information to the government. Don't the defendants have access to BitMEX for getting the same material from BitMEX that BitMEX produces to

the government? There obviously is an advantage to all the parties to have a central discovery process with Bates numbers that the parties can use on both sides and know where it comes from, et cetera, as opposed to BitMEX producing it solely to the defendants, which if the defendants then attempted to use, might result in some questions by the government whether it be authenticity or something else. So, there's an advantage to all parties to have a central means of getting documents and then providing them to both parties. I would have thought that to the extent that the defendants say this information is chock full of exculpatory information, the defendants have it. They know what's in the information and they could and may have already gotten it from BitMEX.

Again, I'm saying you don't have to respond to that if you don't to.

MR. SMITH: We certainly all wish to be singing off the same sheets ever music, your Honor so there is no confusion about what data is, and we have had access a limited to a subset of the Fresh Desk data. But the idea is now that BitMEX has produced a comprehensive set of the data and that the volume sort of outstrips anything we have had access to before and it's just not so simple for the defense team here to -- we don't -- just instruct the company to give us the data. That's not the protocol we have been following. The defendants are all on leave and we don't really have direct access to the

material. So, certainly, we made a request. It got produced. There's a protocol for us to follow in terms of receipt from the government and the delay is just -- as you can tell, I didn't raise it unless it was incredibly frustrating in the context of the upcoming trial and that's why I raised it.

THE COURT: Okay. So, does the government have an estimate as to when the Fresh Desk data will be produced?

MR. REHN: Yes, your Honor. We have been informed that the data will be produced next week. As I said, at this point it's a process of loading it and that's it but it's in process. We understand that it will be ready next week.

THE COURT: Does it make any sense to produce port of it?

MR. REHN: Essentially no, because it's one set of data that kind of needs to be uploaded all together onto the drive that the defense has provided. I don't think there's really a way to batch it out to least as we have. So, we are going to produce it as one production.

THE COURT: Okay. Anything else that anyone wants to raise with me?

When will the motion to dismiss be fully briefed? There's just a reply brief that's necessary, right?

MR. SMITH: Yes. I think we are due at the end of next week, your Honor. Patrick Smith speaking.

THE COURT: Okay. I'll get to the motion promptly and

probably schedule another conference with you.

When is our next set date?

MR. RAYMOND: The next set date actually appears is the final pretrial conference which is March 16th.

THE COURT: Okay. Depending upon what comes in, I may meet with you before then but I can't promise that unless someone specifically has issues that need to be raised, in which case I'm always available.

Okay. Anything else from me today? Okay. Good to talk to you all.

(Adjourned)